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No. 90-1105

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JEROME H. BRADSHAW, CONNIE DAVIS, THOMAS J. FARRELL, LOUIS FONTANAZZA, JAMES GLOVER, MARIA O. GONZALEZ, DONALD GREENE, ANGEL GUTIERREZ, HEATHER D. HALLADA, HAROLD HALLADA, RUSSELL HERRINGDINE, CHARLES P. HEWITT, WILLIAM N. HUGHES, J. CARLTON JOHNS, MARGARET M. KANE, HOWARD M. KATZ, GLENN H. LOGAN, LAWRENCE R. MENGE, ALLEN T. POOLE, AMOS RAGANS, ALBERT RICHMAN, J. ALBERT RODIN, JOSEPH J. ROSSI, LUIS E. SANMIGUEL, LEONARD SBALDIGI, DAVID SCHUMAN, RICHARD SHAPIRO, DANIEL SHEMER, EUGENE SMITH, ARTHUR SOARES, ALEX SULIKOWSKI, HELEN R. SUMRALL, MELVIN TRAGER, JOHN WARE, WILLIE G. WASHINGTON,

Petitioners,

v.

PANTRY PRIDE ENTERPRISES, INC.,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, State of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 4

1. The Petition Should be Denied Because Issues Embodied in the "Questions Presented for Review" Were Not Passed Upon or Decided by the State Appellate Court 4

2. The Petition Should be Denied Because the Record Demonstrates No Denial of Any Rights Under ERISA with Respect to the Unfunded, Unvested Serverance Pay Policies at Issue 5

CONCLUSION 9

APPENDIX

Severance Pay Policy-June 1, 1976 ..... 1A

Severance Pay Policy-May 1, 1981 ..... 3A

TABLE OF AUTHORITIES

Page

CASES

Accardi v. Control Data Corporation, 658 F.Supp. 881 (S.D.N.Y 1987) *reversed on appeal*, 836 F.2d 126 (2d Cir. 1988) 8

Adcock v. Firestone Tire and Rubber Company, 822 F.2d 623 (6th Cir. 1987) 8

Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985) 8

Blau v. Del Monte Corporation, 748 F.2d 1348 (9th Cir. 1985) 7, 8

Bradshaw v. Pantry Pride Enterprises, Inc., 566 So.2d 1306 (Fla. 3d DCA 1990) 3

Cardinale v. Louisiana, 394 U.S. 437 (1969) 5

Ellenburg v. Brockway, Inc., 763 F.2d 1091 (9th Cir. 1985) 8

Firestone Tire and Rubber Company v. Bruch, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) 6, 7

Harris v. Pullman Standard, Inc., 809 F.2d 1495 (11th Cir. 1987) 7

Henne v. Allis-Chalmers Corporation, 660 F.Supp 1464 (E.D. Wis. 1987) 7

Phillips v. Amoco Oil Company, 799 F.2d 1464 (11th Cir. 1986) 7

Sly v. P.R. Mallory & Company, 712 F.2d 1209 (7th Cir. 1983) 8

TABLE OF AUTHORITIES – Continued

Page

Sutton v. Weirton Steel Division of National Steel Corporation, 724 F.2d 406 (4th Cir. 1984) 7

Young v. Standard Oil, 849 F.2d 1039 (7th Cir. 1988) ...7, 8

STATUTES

29 U.S.C. §§ 1001, et seq 2

29 U.S.C. § 1132(a)(1)(B) 5

29 U.S.C. § 1132(e)(1) 5

STATEMENT OF THE CASE

On September 20, 1985, Petitioners filed a Complaint against Respondent in the Circuit Court of Dade County, Florida (R. 1-13). An Amended Complaint was filed on September 27, 1985 (R. 14-26). Eventually, a Second Amended Complaint was filed which forms the basis of the state appeal and the present Petition (R. 47-74; Pet. App. 30-37).

The basic factual allegations of the Second Amended Complaint were that Respondent, at all pertinent times, had a severance pay policy; all Petitioners were "eligible management employees" under the Policy and were aware of the Policy during their employment; on or about June 1, 1976, the Policy was codified as set forth in Exhibit "A" to the Second Amended Complaint (Resp. App. 1A-2A); on or about May 1, 1981, Respondent, "without notice and/or consideration" attempted to "revise" its Policy by providing that severance pay would not be available to employees who were offered or who accepted employment with the purchaser of an operation or a department, as set forth in Exhibit "B" to the Second Amended Complaint (Resp. App. 3A-4A); beginning in August, 1983, Respondent sold its grocery distribution warehouses in Jacksonville and Miami; prior to being terminated by Respondent, Petitioners were notified that they would receive no severance unless they were not hired by the purchaser or failed to be employed for at least sixteen (16) weeks; and Respondent rejected Petitioners' requests for severance pay.

The Second Amended Complaint contained four counts – three of which were based on state law claims

and the fourth (Count III) which was based on alleged violations of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001, et seq. (ERISA). Count III, after stating that Respondent's severance Policy was an "employee welfare benefit plan" as defined under the Act, specifically alleged the following violations of ERISA (Pet. App. 36):

> PANTRY PRIDE breached its statutory and fiduciary duties toward the Plaintiffs. Said breaches included attempting to unilaterally change and revoke the Policy's provisions to the Plaintiffs' detriment, and failing to pay the severance in accordance with the Policy.

No other ERISA violations were alleged in the Second Amended Complaint nor was the pleading ever further amended to include other allegations concerning ERISA.

Respondent's responsive pleadings were filed and the cause was set for trail (R. 141-148, 243). Following pre-trial discovery, Respondent filed its Motion for Summary Judgment pursuant to which a hearing was held and authorities and arguments of counsel were presented to the trial court (R. 262-274, 297-334).

On July 18, 1989, the trial court entered an Order granting Respondent's Motion for Summary Judgment as to the state law claims on the ground that they were preempted by the federal ERISA statute which was the subject of Count III (Pet. App. 9-10). Subsequently, on July 20, 1989, the trial court entered its final Order Granting Defendant's Motion for Summary Judgment as to all counts of the Second Amended Complaint (Pet. App. 7-8).

The pertinent undisputed facts presented to the trial court by the pleadings and documents on file were that Petitioners were former employees of Respondent Pantry Pride who obtained employment with purchasers of the Pantry Pride facilities at which they worked. In each instance, the individual Petitioner's employment with the successor employer involved virtually identical job duties and compensation to that received while employed by Respondent. In addition, Petitioners began working for the successor employer immediately after the effective transfer of the facilities without any break in their employment (R. 262-263, 299).

On June 1, 1976, Respondent had issued a written codification of a severance pay policy (Resp. App. 1A-2A). On May 1, 1981, Respondent issued a written revision to that Policy (Resp. App. 3A-4A). Upon Respondent's sale of its respective operations involving the Petitioners, who all received employment with the successor employer, severance benefits were not offered or paid to Petitioners (R. 49-50, 54-57, 263-264).

In their appeal from the trial court's entry of summary judgment against them, the basis of Petitioners' arguments was that Respondent had violated the disclosure requirements of ERISA in not notifying them of the modification of the severance pay Policy and that, as such, the modified Policy's terms should not be applicable to preclude them from receiving severance pay upon the sale of Respondent's facilities. The Third District Court of Appeal of the State of Florida affirmed the judgment of the trial court. *Bradshaw v. Pantry Pride Enterprises, Inc.*, 566 So.2d 1306 (Fla. 3d DCA 1990) (Pet. App. 1-5). Contrary to Petitioners' assertion (Pet. 1), however,

the appellate court did not construe the terms of a severance plan that was enacted but never communicated. Rather, the appellate court assumed *arguendo* Respondent's violation of the disclosure requirements of ERISA, further assumed that the remedy would be the enforcement of the prior Policy as requested in the Second Amended Complaint and held, nonetheless, that Petitioners were not entitled to severance benefits under the plain terms of that prior policy (566 So.2d at 1307-1308; Pet. App. 4-5). The trial court's judgment was thus affirmed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The petition should be denied because the issues embodied in the "Questions Presented for Review" were not passed upon or decided by the state appellate court.

Petitioners' formulation of their "Questions Presented for Review" by this Court (Pet. i) fails to take into account the fact that the holding of the state appellate court sought to be reviewed here by writ of certiorari makes neither the factual nor legal findings being asserted by Petitioners as the basis for review.

Petitioners seek to have this Court review whether, under ERISA, an employer may modify a severance pay policy without notifying its employees and, thereafter, apply the terms of the uncommunicated modified policy to the employees to deny them severance benefits. While this issue was presented and argued to both the trial court and the appellate court, the appellate court, in the

decision sought to be reveiwed, refused to pass upon this issue. Instead, it based its decision on the application of the plain terms of the very Policy sought to be applied by the Petitioners in their complaint. Since the "Questions Presented for Review" were not passed upon below, they are not appropriate for consideration by this Court under its certicrari jurisdiction. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

2. The petition should be denied because the record demonstrates no denial of any rights under ERISA with respect to the unfunded, unvested severance pay policies at issue.

Assuming *arguendo* that the questions have been properly presented, Petitioners' contentions are, in any event, incorrect and clearly do not merit further review by this Court. First, while the Petition is replete with references to, and arguments about, the effect of alleged disclosure and other procedural violations of ERISA by Respondent, the Second Amended Complaint (Pet. App. 30-37) contains no counts and no allegations regarding substantive harm alleged to have been suffered by Petitioners by virtue of any procedural violations aside from an allegation pertaining to the lack of notice concerning the May 1, 1981, revisions to the severance pay plan (Resp. App. 3A-4A). There are no separate claims for reporting or disclosure violations. Indeed, if there had been, the state court would have been without jurisdiction to try them. 29 U.S.C. §§ 1132(a)(1)(B), 1132(e)(1). Simply stated, alleged procedural violations of ERISA were not properly a matter before the state courts nor are they properly a matter before this Court.

Second, Petitioners contend (Pet. 8-11) that the applicable standard of review is that which was set forth by this Court in *Firestone Tire and Rubber Company v. Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) which established the standard of review to be applied in reviewing a plan administrator's denial of benefits based on plan interpretations. The present case, however, as presented in the Second Amended Complaint (Pet. App. 36), as argued by Petitioners' counsel to the trial court (R. 325-331), and as presented to the state appellate court and this Court, is *not* a plan interpretation case. The issue presented here is not the meaning or interpretation of the May 1, 1981 plan but, rather, Respondent's alleged "changes" to the Policy from that which existed prior to May 1, 1981. Indeed, Petitioners have never contested the fact that the language of the May, 1981, Policy clearly and unequivocally precludes them from receiving severance benefits in the circumstances presented here. As such, Petitioners' discussion of *Firestone* and other cases relying on the standard of review applicable to plan interpretation cases is irrelevant and of no support to their contentions here.

Third, Petitioners' contentions that Respondent violated its statutory and fiduciary duties under ERISA by unilaterally changing its severance pay policy in May, 1981, without notice or consideration to them is without merit. Indeed, at the hearing before the trial court, counsel for Petitioners conceded that, under ERISA, employers have the "absolute" right to unilaterally change unfunded, unvested severance pay policies such as that involved here (R. 325, 330). Petitioners' concession in this regard is clearly supported not only by the case

law on the subject but also by the purposes of ERISA as it applies to severance benefits as contrasted with other benefits protected by the statute.

For example, in *Young v. Standard Oil*, 849 F.2d 1039 (7th Cir. 1988), the Seventh Circuit Court of Appeals, in a case strikingly similar in its relevant facts to the present case, held that severance benefits are "welfare benefits" under ERISA, are thus unaccrued and unvested benefits, and may be unilaterally altered or abolished by the employer without violating its statutory or fiduciary duties under ERISA[1]. See also, *Phillips v. Amoco Oil Company*, 799 F.2d 1464 (11th Cir. 1986); *Sutton v Weirton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th Cir. 1984); *Henne v. Allis-Chalmers Corporation*, 660 F.Supp. 1464 (E.D. Wis. 1987).

Contrary to Petitioners' contentions (Pet. 10-20), neither *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985) nor *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987) is in conflict with the state court opinion or is of support to Petitioners' positions here. Both *Blau* and *Harris* involved egregious, wholesale violations of

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[1] *Young v. Standard Oil, supra*, was, in part, decided under the "arbitrary and capricious" standard subsequently brought into question by this Court's decision in *Firestone Tire and Rubber Company v. Bruch, supra*. However, in *Young*, the employee challenged both the terms of the severance plan which, as here, had been changed, and the interpretive decision to deny benefits. It is the latter portion of the *Young* case to which the "arbitrary and capricious" standard applied (not at issue here) and the former portion of the decision which is applicable to the present case (i.e., not the interpretation of the plan but, rather, its development).

ERISA's procedural requirements (including active concealment in *Blau*) rising to such a level as to have significance in determining the reasonableness of the employer's administration, i.e. *interpretation*, of its plan. The issue here is not one of reasonableness of interpretation. As such, the mere fact of non-disclosure of a modification to an unfunded, unvested severance pay plan or other procedural irregularities do not rise to the level of substantive harm which would render the modified plan ineffective or inapplicable. *Young v. Standard Oil, supra:* see also, *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983).

Petitioners' quotation from *Adcock v. Firestone Tire and Rubber Company*, 822 F.2d 623 (6th Cir. 1987) (Pet. 26-28) is incomplete and misleading. That court's recitation of the District Court's holding regarding the "vesting" of employee benefit plans quoted in the last paragraph at pages 27-28 of the Petition was specifically disapproved of by the Court of Appeals in that very same opinion as an impermissible advisory opinion by the District Court and probably wrong (822 F.2d at 627-628).

Petitioners further rely, as they did in the state appellate court, on the case of *Accardi v. Control Data Corporation*, 658 F.Supp. 881 (S.D.N.Y. 1987). Despite having acknowledged it in their state Reply Brief (Reply Brief of Appellants, 8-9), Petitioners have failed to note here that this case was reversed on appeal in *Accardi v. Control Data Corporation*, 836 F.2d 126 (2d Cir. 1988).

Petitioners simply failed to demonstrate to the state courts, and have failed to demonstrate here, any violation of protected rights under ERISA. Nor have they demonstrated conflict between the decision of the Third District Court of Appeal of the State of Florida and any federal court decisions, or any other reason for this Court to grant their Petition.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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APPENDIX

EXHIBIT A

P-543 D (2/78)

MANAGEMENT PERSONNEL

SEVERANCE PAY

POLICY NO.: 804
ISSUED: 6/1/76
REVISED:
PAGE: 1 OF 2

FOOD FAIR

Policy

The Company will pay severance pay on a weekly basis to eligible management personnel affected by the closing of a plant or department and who remain actively at work through the date set by the Company in accordance with the following schedule:

Food Fair Service	Severance Pay
Less than one (1) year	None
More than one (1) year	One (1) week's pay for each full year of service with a maximum of sixteen (16) weeks pay.

No severance pay will be paid to employees taking early retirement, normal retirement at age sixty-five (65) or leaving through voluntary resignation.

An employee otherwise eligible for severance pay shall not receive any pay beyond the last day of the month in which their sixty-fifth (65th) birthday occurs.

Procedure

1. The individual in charge of the division, branch, zone, facility, department, etc. shall submit the name or names of those to be terminated to the Personnel Administration Department sufficiently in advance to permit proper processing.

2. The Personnel Administration Department shall check the calculation and obtain approval from the Industrial Relations Department.

3. The Personnel Administration Department shall pay the severance pay on the final payroll on which the employee appears in an active status.

4. In addition, any earned vacation which has not been used or lapsed, together with a pro-rata vacation earned to the last day of work, shall also be paid on the final payroll.

EXHIBIT B

P-543 D (2/78)

MANAGEMENT PERSONNEL

SEVERANCE PAY

POLICY NO.: 804
ISSUED: 6/1/76
REVISED: 5/1/81
PAGE: 1 OF 2

FOOD FAIR

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No severance pay will be paid to employees taking early retirement, normal retirement at age sixty-five (65), leaving through voluntary resignation or in accordance with policy and past practice, upon being offered employment by or obtaining successor employment with the purchaser of an operation or department.

An employee otherwise eligible for severance pay shall not receive any pay beyond the last day of the month in which their sixty-fifth (65th) birthday occurs.

Procedure

1. The individual in charge of the division, branch, zone, facility, department, etc. shall submit the name or names of those to be terminated to the Personnel Administration Department sufficiently in advance to permit proper processing.

2. The Personnel Administration Department shall check the calculation and obtain approval from the Industrial Relations Department.

3. The Personnel Administration Department shall pay the severance pay in weekly or monthly installments in accordance with current pay period practices.

a. Payments will begin at the end of the first non-work week or month (whichever is appropriate) and continue on a week-to-week or month-to-month basis. Payment will cease when the full severance benefit entitlement, as outlined in the above policy, has been paid out to the individual.

4. In addition, any earned vacation which has not been used or lapsed, together with a pro-rata vacation earned to the last day of work, shall also be paid on the final payroll.